INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-786

MAJ. FRANK ROSS, and
THE STATE OF NORTH CAROLINA,

Petitioners,

VS.

CLAUDE F. MOFFITT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

CONSTITUTIONAL PROVISIONS INVOLVED

Ill. Const. Art. VI, § 4:

§ 4. Supreme Court—Jurisdiction

(a) The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.

(b) Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right. The Supreme Court shall provide by rule for direct appeal in other cases.

(c) Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, or if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided by the Supreme Court. The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

Ill. Const. Art. VI, § 6:

§ 6. Appellate Court—Jurisdiction

Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts. The Appellate Court may exercise original jurisdiction when neces-

sary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review of administrative action as provided by law.

STATUTES INVOLVED

Ill. Rev. Stat. 1971, Ch. 110 A, § 315:

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal: Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Ill. Rev. Stat. 1971, Ch. 110 A, § 317:

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court.

Ill. Rev. Stat. 1971, Ch. 110 A, § 603:

603. (Supreme Court Rule 603). Court to Which Appeal Is Taken

Appeals in criminal cases in which a statute of the United States or of this State has been held invalid and appeals by defendant from judgments of the circuit courts imposing sentence of death shall lie directly to the Supreme Court as a matter of right. All other appeals in criminal cases shall be taken to the Appellate Court.

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the requirements of counsel imposed by this Court. Procedures established in Illinois for appointment of counsel for discretionary appeals have been accepted by the Seventh Circuit Court of Appeals in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir. 1969). Similar procedures exist in the State of North Carolina and those procedures were struck down by the Fourth Circuit Court of Appeals in *Moffitt* v. *Ross*, 483 F. 2d 650 (4th Cir. 1973). Any decision by this Court which changes the appellate procedures followed in North Carolina will directly affect the procedures in Illinois. Therefore, the State of Illinois has a direct and important interest in any such decision.

I.

ILLINOIS APPELLATE PROCEDURES, SIMILAR TO THOSE OF NORTH CAROLINA, HAVE BEEN FOUND TO AFFORD INDIGENTS ADEQUATE ACCESS TO THE COURTS.

The Illinois system of appellate review is very similar to that of North Carolina. Both States have a multi-tiered appellate system with appeals from convictions involving

State or Federal Constitutional questions or of capital cases going directly to the Supreme Court of the State.[1] All other convictions are appealed, as a matter of right, to the Appellate courts.[2] In appeals taken as a matter of right, counsel is guaranteed to indigents. Illinois does not guarantee counsel in the preparation of petitions requesting discretionary appeals but once the case is taken, the reviewing court appoints counsel for preparation of the brief.

In Illinois, several alternatives are available to inmates petitioning for discretionary appeal. The most common practice is for the *pro se* petitioner to send the court a copy of his appellate court brief and a copy of the appellate court opinion. However, even a letter expressing a desire for further appeal has been sufficient to convince the court to hear the case.[3] In Cook County, Illinois, the Public Defender regards himself authorized to represent his clients, without further court appointment, on leave to appeal in the Illinois Supreme Court and petitions for certiorari in the United States Supreme Court. The decision to file the Petition is made by the Public Defender on the basis of the merits of the case. Illinois also has a

---

1. Ill. Const., Art. VI, § 4; Ill. Rev. Stat. 1971, Ch. 110A, §§ 317, 603. N.C.G.S. § 7A-27(a). North Carolina also provides for review of appellate cases in which a dissenting opinion has been filed.

2. Ill. Const., Art. VI, § 6; Ill. Rev. Stat. 1971, Ch. 110A, § 315; N.C.G.S. § 7A-31.

3. For example, People v. Norbert Jones, appeal docketed, No. 45631, Ill. Supreme Court; People v. Wilford Jones, appeal docketed, No. 45633, Ill. Supreme Court.

State Appellate Defender[4] which has filed several Petitions for Leave to Appeal and will file Petitions for Certiorari in appropriate cases.

One important similarity in the procedures of Illinois and North Carolina is that, in questions involving the state or federal Constitution, appeals are taken as a matter of right.[5] The Fourth Circuit recognized this in its opinion, 483 F. 2d at 651, and yet expressed its concern that,

> in the context of constitutional questions arising from criminal prosecutions, permissive review by the state's highest court may be predictably the most meaningful review the convictions will receive. 483 F. 2d at 653.

The Court went further by acknowledging that the appeal in the case *sub judice* did not involve a constitutional question. 483 F. 2d at 651. Therefore, the Court's concern that important Constitutional questions will not be subject to review is unfounded for, by definition, such review is a matter of right in North Carolina and Illinois. Hence, the Court's holding must be interpreted only in light of appeals not involving Constitutional issues. For this reason, the court's discussion of appeal of an issue involving an indigent's Constitutional rights is not germane to the real issue, which is access to the courts.

The Seventh Circuit considered this precise question in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir., 1969) and decided that refusal to appoint counsel for discretionary appeals was not a denial of either due process or equal protection guarantees. The

---

4. Ill. Rev. Stat. 1971, Ch. 38, § 208 (1972 Supp. pp. 211-12)

5. See footnote 1, *supra*.

Court recognized the alternatives to counsel in noting:

> A second reason for not imposing on the Illinois Supreme Court the duty of providing counsel for every petitioner seeking a discretionary appeal is that, if in fact a petitioner, such as Pennington, does have a meritorous constitutional claim which he has heretofore failed to assert, this claim has either been waived and so could not under any circumstances be presented to the Illinois Supreme Court on appeal or it concerns such a fundamental right that an adequate remedy still exists in the form of the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. 1967, ch. 38 § 12-1, *et seq.* 409 F. 2d at 760.

These alternatives, together with the access to the courts guaranteed to a prisoner, make the requirement of counsel an unnecessary burden on the states. By allowing the prisoner to petition for waiver of filing and transcript fees, and by notifying him of his rights on appeal, the State has sustained its burden of keeping its courts open to everyone. Illinois procedure has been found adequate to safeguard rights on appeal in that it provides that a defendant,

1. May seek leave to appeal by filing his first appeal brief along with a copy of the lower court's opinion, and,
2. be notified of the affirmation of his conviction and applicable time limits for appealing the decision.

The procedure for discretionary appeals is virtually the same in both Illinois and North Carolina. Both States allow indigents to file *in forma pauperis* and provide free transcripts. Counsel is appointed once a case is taken on and appeals involving Constitutional issues are allowed as matters of right. These procedures assure indigents of the access to the courts that is their Constitutional right.

To require more is to ignore not only the nature of discretionary appeals but also the limited resources of the states. This Court is urged to adopt the policy for discretionary appeals as set forth by the Seventh Circuit in *Pennington.*

II.

THE DIFFERENCES BETWEEN APPEALS OF RIGHT AND DISCRETIONARY APPEALS, RECOGNIZED IN OTHER DECISIONS, WAS IGNORED BY THE FOURTH CIRCUIT.

In its opinion in *Moffitt,* the Fourth Circuit held that it could discern no differences between appeals of right and those which are granted only through the discretion of reviewing courts. However, such a distinction has been an important factor in the decisions of the other courts that have considered this issue. This Court, in *Douglas* v. *California,* 372 U.S. 303 (1963), considered the issue of an indigent's right to counsel on his appeal of right. The Court specifically differentiated between appeals of right and discretionary appeals when it said:

> We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction, on whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by Appeal as of right of by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not count to a denial of due process or an "invidious discrimination." 372 U.S. at 356 (citations omitted)

The Court (Douglas, J.) went on to explain that the law need not attempt to eradicate all differences between people:

> Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor. 372 U.S. at 356 (citations omitted)

Thus, this Court found an obvious and important distinction between appeals of right and discretionary appeals.

The Seventh Circuit Court of Appeals also decided this issue in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir. 1969), by placing emphasis on the different types of appeals. Referring to the quote from *Douglas, supra*, the Seventh Circuit specifically refused to extend the right to counsel to the second discretionary stage of appeal. 409 F. 2d at 760.

Both *Douglas* and *Pennington* recognized the issue involved in discretionary appeals to be that of free and equal access to the courts. By allowing indigents to proceed *in forma pauperis*, by allowing free transcripts to those unable to afford them, and by appointing attorneys once the case has been taken on, the Courts have insured that every person has the same right of access to the courts. While the Fourth Circuit correctly perceives the issue involved to be access to the courts, its decision fails to recognize that the right to counsel is not always a concomitant to the right of access to the courts. Illustrative of the Court's failure to perceive the issue is the fact that the decision in *Moffitt* was specifically confined to criminal appeals. The Court said:

> Finally, we may emphasize that we are dealing with the rights of defendants in criminal cases. Nothing which we have said should be taken as having any application in any collateral, civil proceeding, though it may call into question the validity of a previous criminal conviction. 483 F. 2d at 656.

In so holding, the Fourth Circuit has apparently determined that it is better policy to provide counsel to pursue the long odds for a discretionary appeal, than to appoint counsel in civil proceedings involving the validity of a state conviction such as a federal habeas corpus action. Similarly, a prisoner who is being subjected to cruel and unusual punishment would not be allowed counsel in a civil rights action by the decision in *Moffitt*.

By failing to recognize the difference between appeals of right and discretionary appeals, and by specifically refusing to acknowledge the importance of counsel at collateral, civil proceedings, the Fourth Circuit has placed inordinate emphasis on the importance of counsel in the preparation of petitions for discretionary appeals. Yet, after emphasizing the role of counsel in such cases, the Fourth Circuit seems to contradict itself by observing:

> Yet is it a relatively minor burden we would impose on the Bar by this decision. Once a lawyer has handled one appeal, and is thoroughly familiar with the case, the issues, and the authorities, it is a relatively simple and easy task for him to prepare and file a petition for further discretionary review in a higher appellate court. That is all that is involved in these cases, for the prevailing practice of second tier appellate courts, having a discretionary jurisdiction, has been to appoint counsel for indigents once certiorari has been granted. 483 F. 2d at 655.

With this, the Court has implied that very little more than a reiteration of the appellate arguments is required. This

being true, submission of the appellate court brief, which was prepared by counsel, and the appellate court's opinion should be sufficient, even by the Fourth Circuit's standards, to apprise the higher reviewing court of the issues involved. Since the issues on discretionary appeals are, by definition, not of Constitutional dimensions, such a system as is found in Illinois and described herein, must be deemed adequate to allow indigents equal access to the courts.

III.

THE FOURTH CIRCUIT'S DECISION IMPOSES TOO GREAT A BURDEN UPON THE STATES' JUDICIAL SYSTEMS AND RESOURCES.

The *Moffitt* decision tended to minimize the burden that its holding would place on the individual states. However, in both *Douglas* and *Pennington*, the courts recognized that realistic limits must be placed on the judicial system. In *Pennington*, the Seventh Circuit noted:

> A further reason for not placing the burden on the Illinois court system of providing counsel to appellants, such as the petitioner, is our recognition of the practical problems which would be involved in the implementation of such a right. We are not unmindful of Illinois' experience in implementing the right-to-counsel requirements of *Gideon* and *Douglas*. Institutional limitations are also important considerations. We think that the distincton between equality of access to the courts as required in *Griffin* and *Burns* and the right to appointment of counsel is meaningful. This distinction has the practical merit that the states are institutionally better prepared to waive fees and costs for the poor than they are to provide free counsel. 409 F. 2d at 760.

In so holding, the Seventh Circuit recognized that because the issue involved access to the courts, waiving fees for indigents is adequate to insure such access.

The *Moffitt* case imposes an intolerable burden on the states with seeming disregard for the limitations of the system. Not only would states be required, under *Moffitt* to pay for attorneys in appeals to state courts, but also for appeals to the United States Supreme Court. This position is untenable. If Federal courts desire counsel appointed for litigation in federal courts, then clearly the burden is upon the federal government and not the several states, to provide for it. Such a holding results in the State always required to pay the attorney's fees of the defendant. While courts may order one party to pay another's fees, such powers should be exercised on a case-by-case basis and then only quite sparingly.

The burden being imposed becomes even more obvious in light of comments by Mr. Justice Clark, dissenting in *Douglas:*

> We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous. Statistics of this Court show that over 96% of the petiitons filed here are of this variety.[6] 372 U.S. at 358.

Imposition upon the states of the onus paying for appeals that are overwhelmingly shown to be frivolous and not of a Constitutional nature is clearly not an acceptable result. Certainly even Judge Haynsworth, who spoke for the court in *Moffitt,* would not concede that the courts

---

6. Statistics from the office of the Clerk of this Court reveal that in the 1961 Term only 38 of 1,093 *in forma pauperis* petitions for certiorari were granted (3.4%). Of 44 *in forma pauperis* appeals, all but one were summarily dismissed (2.3%). (Court's footnote)

have sufficient resources to handle their existing case load.

Even if there had been an increase in legal resources of which the Court spoke, 485 F. 2 at 655, there has been no weighing by the Court of how these resources are to be allocated. As discussed in Part Two of this brief, the Fourth Circuit has made no allowance for habeas corpus actions or civil rights complaints in its decision. Certainly, the allocation of the resources to these areas must at least be considered. In choosing to disregard the burden imposed on the judicial system by its decision, and in failing to consider alternative methods of allocating the resources now existing, the Fourth Circuit erred and the State of Illinois, as *amicus curiae,* urges this Court to adopt the rule for counsel on discretionary appeals as set forth in *Pennington.*

CONCLUSION

The procedures established in Illinois and North Carolina are consistent with Constitutional requirements and afford indigents equal access to the courts. To change them as suggested by *Moffitt* v. *Ross* would be to impose an intolerable and unnecessary burden on the states while serving to only marginally increase an indigent's chances of convincing a Court to review his conviction. Therefore, the People of the State of Illinois urge this Court to reject the Fourth Circuit's decision and, instead, adopt the approach of the Seventh Circuit Court of Appeals in *United States ex rel. Pennington* v. *Pate.*

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JAMES B. ZAGEL,*
Assistant Attorney General,
188 West Randolph Street,
Chicago, Illinois 60601,

Attorneys for Petitioners.

* Attorneys for the People of the State of Illinois were assisted in the preparation of this brief by Harry C. Bulkeley.